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4 UNITED STATES DISTRICT COURT  
5 EASTERN DISTRICT OF WASHINGTON

6 UNITED STATES OF AMERICA,  
7 Plaintiff,

8 -vs-

9 DAMON JOHN HEINTZ,  
10 Defendant.  
11

NO. CR-05-0109-WFN

ORDER

12 Pending before the Court is Defendant's Motion to Dismiss the Indictment, filed  
13 September 9, 2005, Ct. Rec. 29. Defendant is charged with being in possession of a firearm  
14 while subject to a protective order. *See* 18 U.S.C. § 922(g)(8). Defendant argues that the  
15 Indictment must be dismissed because the protective order which forms the basis for his  
16 firearms disability was not issued after a hearing for which the Defendant received "actual  
17 notice" and "an opportunity to participate." *Id.* For the reasons discussed below, the Court  
18 grants the Defendant's motion.

19 **I. BACKGROUND**

20 On or about December 16, 2004, the Defendant was involved in an encounter with  
21 Amanda Elliot at a Yakima nightclub. It is alleged that the Defendant pulled Ms. Elliot's hair,  
22 shoved her, and kicked her car. It is further alleged that Ms. Elliot is the Defendant's  
23 ex-girlfriend. On or about January 14, 2005, the City of Yakima charged the Defendant with  
24 assault and malicious injury to property based on the December 16, 2004 encounter.

25 On February 18, 2005, the Defendant appeared before Yakima Municipal Court Judge  
26 Susan Woodard for an arraignment on the assault and malicious injury complaint.

1 Defendant's attorney on that matter, George Colby, stipulated to probable cause for  
2 arraignment purposes, but specifically denied the existence of a domestic relationship  
3 between the Defendant and Ms. Elliot.<sup>1</sup>

4 Judge Woodard then asked the prosecutor whether the city wanted a no-contact order.  
5 *See* Transcription of [Arraignment] Proceedings, at p. 3. The prosecutor answered in the  
6 affirmative. Judge Woodard did not allow the defense to respond; instead, she commented  
7 that such an order would be "standard procedure with this type of accusation." *Id.* The no-  
8 contact order was entered and Judge Woodard explained that it prohibited the Defendant from  
9 coming within 500 feet of Ms. Elliot. The order also imposed a firearms disability, although  
10 that component was not specifically highlighted during the arraignment. Judge Woodard  
11 further informed the parties that the no-contact order would not be reviewed pretrial unless  
12 the city was in agreement. *See id.* at p. 3-4.

13 On March 11, 2005, the Defendant was found in possession of two firearms. On  
14 May 25, 2005, a federal grand jury indicted the Defendant in a one-count Indictment which  
15 charges a violation of 18 U.S.C. § 922(g)(8). The basis for the federal charge is the  
16 February 18, 2005 Yakima Municipal Court no-contact order.

## 17 II. DISCUSSION

18 **A. Relevant Statute.** The Defendant is charged with violating 18 U.S.C. § 922(g)(8).  
19 The statute provides, in part, that it shall be unlawful for any person to... possess in  
20 or affecting commerce, any firearm or ammunition, or to receive any firearm or  
21 ammunition which has been shipped or transported in interstate or foreign commerce, where  
22 such person:

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23  
24 <sup>1</sup>Defendant's attorney in the federal proceedings also denies the existence of a domestic  
25 relationship between the Defendant and Ms. Elliot (i.e., Ms. Elliot does not qualify as an  
26 "intimate partner" as it is defined by 18 U.S.C. § 921(a)(32)).

1 is subject to a court order that—

2 (A) was issued after a hearing of which such person received  
3 **actual notice**, and at which such person had an **opportunity to**  
4 **participate**;

5 (B) restrains such person from harassing, stalking, or  
6 threatening an intimate partner of such person or child of such intimate  
7 partner or person, or engaging in other conduct that would place an  
8 intimate partner in reasonable fear of bodily injury to the partner or  
9 child; and

10 (C) (i) includes a finding that such person represents a credible  
11 threat to the physical safety of such intimate partner or child; or (ii) by  
12 its terms explicitly prohibits the use, attempted use, or threatened use of  
13 physical force against such intimate partner or child that would  
14 reasonably be expected to cause bodily injury . . .

15 18 U.S.C. § 922(g)(8) (emphasis added).

16 **B. Preliminary Matters.** As a preliminary matter, the Court must consider whether  
17 notice and opportunity to participate are properly raised in a pretrial motion. "A party may  
18 raise by pretrial motion any defense, objection, or request that the court can determine without  
19 a trial of the general issue." FED. R. CRIM. P. 12(b)(2). "A motion to dismiss is generally  
20 capable of determination before trial if it involves questions of law rather than fact." *United*  
21 *States v. Nukida*, 8 F.3d 665, 669 (9th Cir. 1993) (internal quotation and citation omitted).  
22 "Although the court may make preliminary findings of fact necessary to decide the legal  
23 questions presented by the motion, the court may not invade the province of the ultimate  
24 finder of fact." *Id.* (same).

25 Here, both the Defendant and the Government agreed that the factual record is  
26 complete and that the motion is ripe for decision. The Court therefore deems it appropriate  
to determine at this stage of the proceedings whether the February 18, 2005 Yakima  
Municipal Court protective order can form the basis for a §922(g)(8) charge. *See e.g., United*  
*States v. Herron*, 45 F.3d 340 (9th Cir. 1995) (upholding the dismissal of a felon in  
possession charge because the defendant's civil rights on the underlying felony had been  
restored); *United States v. Banks*, 339 F.3d 267 (5th Cir. 2003) (deciding issues of notice and

1 opportunity to participate in a pretrial motion where Government consented to a pretrial  
2 resolution).

3 **C. Analysis.** The Ninth Circuit has not yet defined the concepts of "actual notice" and  
4 "opportunity to participate" as they are used in 18 U.S.C. § 922(g)(8). The Court therefore  
5 looks to the reasoning of the Fifth, Sixth, Seventh, and Eighth Circuits, each of which has  
6 considered the issues before this Court.

7 The mere fact that a protective order may be enforced does not bring in within the  
8 scope of 18 U.S.C. § 922(g). *United States v. Spruill*, 292 F.3d 207, 218 (5th Cir. 2002)  
9 (opining that a TRO issued without notice to the defendant could not form the basis for a  
10 §922(g)(8) charge). However, when actual notice is given by first serving the Defendant with  
11 an *ex parte* restraining order, and the Defendant appears at a scheduled hearing where the  
12 presiding judge is "prepared to listen to both sides of the dispute" and "decide [the matter]  
13 impartially," the resulting no-contact order is within the purview of §922(g)(8). *United States*  
14 *v. Banks*, 339 F.3d 267, 271 (5th Cir. 2003).

15 The Sixth Circuit has observed that § 922(g)(8) requires no less than due process. *See*  
16 *United States v. Calor*, 340 F.3d 428, 431 (6th Cir. 2003) (*quoting, among other authorities,*  
17 *Mathews v. Eldridge*, 424 U.S. 319 (1976), and *Cleveland Bd. of Educ. v. Loudermill*, 470  
18 U.S. 52 (1985)). The protective order at issue in *Calor* was an emergency TRO, first issued  
19 on February 9, 2001. 340 F.3d at 429. A hearing was set for February 12, 2001 to determine  
20 whether the order should be extended. *Id.* Mr. Calor obtained counsel to appear at the  
21 February 12, 2001 hearing and request a continuance. *Id.* The state judge granted a  
22 continuance, but issued a second emergency restraining order to cover the intervening time  
23 period. *Id.* The defendant was found in possession of a firearm two days later on  
24 February 14, 2001.

25 The *Calor* court held that the protective order that was in place after the February 12,  
26 2001 hearing formed the basis for a federal firearms disability. *Calor*, at 431. The court

1 reasoned that the defendant received notice when he was served with the first TRO on  
2 February 9, 2001, and that he had the opportunity to participate, but declined to do so, at the  
3 February 12, 2001 hearing. *Id.*

4 The *Calor* court relied on the Seventh Circuit's reasoning in *United States v. Wilson*,  
5 159 F.3d 280 (7th Cir.1998). In *Wilson*, the defendant was subject to a protective order issued  
6 during divorce proceedings. *Id.* at 284. The defendant in *Wilson*, like the defendant in *Calor*,  
7 had advance notice of the proposed action when he was served with the initial emergency  
8 restraining order. *Id.* at 290. The defendant in *Wilson* was also afforded an opportunity to  
9 participate in a "meaningful manner" because at the scheduled follow-up hearing, the  
10 defendant was allowed to present reasons, either in person or in writing, as to why the order  
11 should not be entered. *Id.*; see also *United States v. Lipman*, 369 F.3d 1039, 1042 (8th Cir.  
12 2004) (defendant received actual notice and an opportunity to participate because he appeared  
13 before a judge on the appointed day and time, and the judge was prepared to hear evidence  
14 on the restraining order).

15 In the matter *sub judice*, the Government argues that Mr. Heintz received actual notice  
16 of the hearing because he received notice of the arraignment. Because this was a domestic  
17 violence allegation, the Yakima Municipal Court was required under Washington law to  
18 determine whether a co-contract order should be issued. R.C.W. 10.99.040(3) ("At the time  
19 of arraignment the court shall determine whether a no-contact order shall be issued or  
20 extended."). The Government therefore contends that since the Defendant was represented  
21 by an attorney at the arraignment, that attorney, and by extension the Defendant, had actual  
22 notice that the judge would be deciding whether to issue a no-contact order.

23 The Government's argument is contrary to the reasoning in the case law discussed  
24 above. In each of the cases where the court held that the protective order created a federal  
25 firearms disability, the defendant had notice of a hearing where the specific issue of a  
26 no-contact order would be considered at the hearing. *Banks*, 339 F.3d at 270-71 (defendant

1 advised in open court of a hearing set for the consideration of the protective order); *Wilson*,  
2 159 F.3d at 290 (defendant had advance notice of the proposed action when he was served  
3 with the initial temporary restraining order); *Calor*, 340 F.3d at 431 (same); *Lipman*, 369 F.3d  
4 at 1042 (defendant received actual notice of hearing on protective order). The Government's  
5 argument is also contrary to the Ninth Circuit's interpretation of what constitutes notice in  
6 other criminal contexts. *See e.g., United States v. Williams*, 291 F.3d 1180, 1192-93 (9th Cir.  
7 2002) (discussing the timing and nature of the notice required under Fed. R. Crim. P. 32).

8 In addition, even if the Court were to find that the Defendant received actual notice of  
9 the hearing where the no-contact order was entered, he was not afforded a meaningful  
10 opportunity to participate. The record before the Court establishes that the first time the  
11 Defendant was advised that a protective order would be issued was at the arraignment itself.  
12 *See* Transcript of [Arraignment] Proceedings, at 3. Although the Defendant stipulated to  
13 probable cause for arraignment purposes (while reserving the issue of a domestic  
14 relationship), there is nothing in the transcript that would demonstrate that Judge Woodard  
15 was prepared to hear from the Defendant or defense counsel on the subject of the protective  
16 order. To a certain extent, Judge Woodard precluded the possibility of any meaningful  
17 opportunity for the Defendant to be heard on the protective order by advising the Defendant  
18 that the order would not be reviewed pretrial unless the city was in agreement. The Defendant  
19 was therefore not afforded a meaningful opportunity to participate during the hearing. *Banks*,  
20 at 271 (defendant given the opportunity to present evidence); *Calor*, at 431 (defendant had  
21 the opportunity to participate at scheduled hearing but declined to do so); *Wilson*, at 290  
22 (defendant had an opportunity to participate in a "meaningful manner" because he was  
23 allowed to present reasons, either in person or in writing, as to why the order should not be  
24 entered); *Lipman*, at 1042 (defendant afforded opportunity to participate because the judge  
25 was prepared to hear evidence on the restraining order).

### 26 III. CONCLUSION

1 Under the rule of lenity, any ambiguity in a criminal statute must be construed in favor  
2 of the defendant. *Jones v. United States*, 529 U.S. 848, 858 (2000). 18 U.S.C. § 922(g)(8)(A)  
3 prohibits a person from possessing a firearm if he or she is subject to a protective order that  
4 was issued after a hearing of which such person received "actual notice," and at which, such  
5 person had an "opportunity to participate." The Fifth, Sixth, Seventh, and Eighth Circuits'  
6 interpretation of "actual notice" and "opportunity to participate" is a reasonable one. Mr.  
7 Heintz was not given actual notice prior to the arraignment of the proposed action. He also  
8 was not afforded an opportunity to participate, i.e., to present reasons, either orally or in  
9 writing, as to why the no-contact order should not issue. Therefore, the February 18, 2005  
10 no-contact order cannot form the basis for a federal firearms disability. Accordingly,

11 **IT IS ORDERED** that:

- 12 1. Defendant's Motion to Dismiss, filed September 9, 2005, **Ct. Rec. 29**, is  
13 **GRANTED**.
- 14 2. The Indictment, **Ct. Rec. 1**, is **DISMISSED without prejudice**.
- 15 3. All other pending motions are **DENIED AS MOOT** with right to renew if the  
16 Indictment is reinstated.

17 The District Court Executive is directed to file this Order and provide copies to counsel  
18 **AND TO** the United States Probation Office.

19 **DATED** this 31st day of October, 2005.

20  
21 s/ Wm. Fremming Nielsen  
22 WM. FREMMING NIELSEN  
23 SENIOR UNITED STATES DISTRICT JUDGE  
24  
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